

**FILED BY CLERK**

**FEB 10 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2008-0415
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CHRISTOPHER MICHAEL CONSALES,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074399

Honorable Deborah Bernini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Law Office of Patrick Coppen  
By Patrick C. Coppen

Tucson  
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Christopher Consales was convicted of sale of a narcotic drug and illegally conducting an enterprise, for which the trial court sentenced him to a total of six years in prison. On appeal, he contends the court's reasonable doubt

jury instruction constituted structural error and the court abused its discretion in not sentencing him to the substantially mitigated prison terms for his offenses. For the reasons set forth below, we affirm.

### **Facts and Procedural Background**

¶2 Based on a tip from a confidential informant, the Counter Narcotic Alliance (CNA), a multi-agency task force, began investigating a suspected heroin-selling organization. Acting undercover, Tucson Police Officer Collamore made drug purchases from the organization. On May 31, 2007, Collamore met a man named “Jersey,” later identified as Consales, at a convenience store parking lot to purchase heroin. During the transaction, Consales told Collamore he was one of the original investors in the organization. Collamore gave Consales \$100 for twelve “bindles” of heroin, and the two then went their “separate ways.”

¶3 Police later determined the heroin was being distributed out of a trailer located in a trailer park Consales managed. The state eventually obtained a number of grand jury indictments, and Consales and others involved in the organization were arrested. Consales was charged and convicted of the two counts noted above. The trial court sentenced him to concurrent, enhanced, mitigated sentences of six years for sale of a narcotic drug and 4.5 years for illegally conducting an enterprise. This timely appeal followed.

### **Discussion**

¶4 Consales first contends the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), lessened the state’s

burden of proof and shifted it to him, thereby denying him due process under the Fourteenth Amendment to the United States Constitution. As Consales concedes, our supreme court has rejected constitutional challenges to *Portillo*'s language and "has repeatedly upheld [it] . . . as good law."<sup>1</sup> See, e.g., *State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). We are not at liberty to overrule or disregard that court's rulings, see *State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000), and therefore do not consider this argument further.

¶5 Consales also argues the trial court abused its discretion by not imposing the substantially mitigated sentences for his convictions. He contends the court considered inaccurate information and "failed to properly investigate [his] background or consider other compelling mitigation." In particular, he suggests the court did not consider the mitigation evidence he presented concerning his "severe mental health disabilities," the abuse he suffered as a child, the failing health of close family members, "his compassionate nature and giving background that included working as a drug counselor, [and] his medical problems with MRSA."<sup>2</sup>

¶6 "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205

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<sup>1</sup>In addition, Consales notes that his argument on this issue is "set forth to hopefully convince the highest Court in Arizona to revisit the issue, and/or to preserve the issue for federal review."

<sup>2</sup>Methicillin-resistant *Staphylococcus Aureus*.

Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). A court abuses its discretion in sentencing when it acts “arbitrarily or capriciously or fail[s] to adequately investigate the facts relevant to sentencing,” and we generally will find no such abuse when the trial court “fully considers the factors relevant to imposing sentence.” *Id.*; *see also State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). We additionally presume the court considers all relevant sentencing information presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the “weight to be given any factor asserted in mitigation rests within the trial court’s sound discretion,” *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

¶7 Here, Consales presented substantial mitigating evidence. In addition to the factors he contends the trial court did not appropriately consider, six letters were submitted to the court on his behalf, and he presented evidence concerning his family support, employment history, enrollment in college, and history of drug addiction. At sentencing, the court stated it “had a chance to read the pre-sentence report. There were six letters written in support of [Consales], . . . but I’ve read and considered all of that.” It also stated it had considered Consales’s sentencing memorandum, and it heard Consales’s argument at the sentencing hearing. In imposing mitigated sentences, the court found as mitigating factors Consales’s “remorse, family support, community support, . . . employment history, and the difficulties, both the successes and the failures, that [he had] had with long-time addiction that [went] back to the time [he was] almost 15 years old.”

¶8 That the trial court did not find Consales’s evidence sufficient to justify substantially mitigated sentences does not mean the court did not consider the evidence in making its determination. A sentencing court “is not required to find mitigating factors just because evidence is presented; [it] is only required to consider the [evidence].” *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986); *see also Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357. Here, the court stated it had considered all the evidence presented, and the sentences it imposed were within the statutorily authorized range. *See* A.R.S. § 13-703(I).<sup>3</sup> We therefore cannot say the court erred in imposing mitigated, rather than substantially mitigated, sentences for Consales’s offenses. *See Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357.

### Disposition

¶9 For the reasons stated above, we affirm Consales’s convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge

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<sup>3</sup>The Arizona criminal sentencing code has been renumbered, effective “from and after December 31, 2008.” *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer to the current section number rather than that in effect at the time of the offenses in this case.